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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Southwestern Bell Telephone Company
Tariff F.C.C. No. 73

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CC Docket No. 97-158
Transmittal No. 2633

COMMENTS ON SWBT'S DIRECT CASE

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SUMMARY

The Commission should find that SWBT's proposal to offer customer-specific rates and network arrangements in response to requests for proposals ("RFPs") violates basic Commission rules and policies that cannot be justified, as SWBT alleges, on the basis of competitive necessity. First, SWBT's tariff amounts to a contract tariff which dominant local exchange carriers ("LECs"), such as SWBT, are prohibited from offering under the Commission's Rules. Second, SWBT's discrete customer-specific rates violate Section 69.3(e)(7) of the Commission's Rules, which requires dominant LECs to provide access service only under averaged rates. Third, SWBT's rates amount to ICB pricing, which it has not attempted to justify. None of these violations of the Commission's Rules and policies can be excused by SWBT's resort to the competitive necessity test.

The competitive necessity test has a very narrow purpose -- to determine whether a given rate or practice is not unreasonably discriminatory under Section 202(a) of the Act. It has no relevance in any other context, and cannot be used to condone SWBT's failure to comply with the separate and independent requirements of the Commission's rules and policies. In any event, SWBT has failed to meet its evidentiary burden of satisfying the competitive necessity test even on its own limited terms. Accordingly, the Commission must find that SWBT's RFP tariff is unlawful.

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COMMENTS ON SWBT'S DIRECT CASE

Teleport Communications Group Inc. ("TCG") hereby comments on the Direct Case filed by Southwestern Bell Telephone Company ("SWBT") in the above-captioned investigation into the lawfulness of SWBT's proposal to offer unique rates and network configurations in response to customer requests for proposals ("RFPs").

SWBT's proposed tariff violates the Commission's explicit rules and policies prohibiting dominant local exchange carriers ("LECs"), such as SWBT, from engaging in geographic rate de-averaging, offering contract tariffs, and restricting them from providing standard services under individual case basis ("ICB") rates. SWBT's RFP tariff cannot be justified by its assertion of the competitive necessity defense to the separate and discrete claim that its RFP tariff rates are unreasonably discriminatory under Section 202(a) of the Communications Act. In any event, SWBT has not satisfied the requirements of the competitive necessity test.

I. INTRODUCTION

In Transmittal No. 2633, SWBT purports to respond to RFPs issued by AT&T and Coastal Telephone ("Coastal") for unique network configurations of DS-3 circuits and multiplexers at specific locations and provided from particular SWBT central offices. On June 13, 1997, the Commission suspended SWBT's transmittal because it raised numerous questions regarding compliance with various Commission policies, and commenced the instant investigation.¹

In its Designation Order,² the Commission asked parties to comment on whether SWBT's transmittal: (1) violates the Commission's policy prohibiting dominant LECs from offering contract tariffs³; (2) violates the restrictions in the Commission's DS-3 ICB Order⁴ concerning the circumstances under which dominant LECs may offer ICB rates; (3) violates Section 69.3(e)(7) of the Commission's Rules which requires dominant LECs to offer averaged rates throughout their individual study areas⁵; and (4) can be justified under Section

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1. Southwestern Bell Telephone Company, DA 97-1251 (rel. June 13, 1997).
 2. Southwestern Bell Telephone Company, Order Designating Issues for Investigation, DA 97-1472 (rel. July 14, 1997) ("Designation Order").
 3. See 47 C.F.R. § 61.3(m); Access Charge Reform, Notice of Proposed Rulemaking and Third Report and Order, 11 FCC Rcd 21354, 21439 (1996) ("Access Reform NPRM").
 4. Local Exchange Carriers' Individual Case Basis DS-3 Offerings, 4 FCC Rcd 8634 (1989) ("DS-3 ICB Order").
 5. See 47 C.F.R. § 69.3(e)(7).

202(a) of the Act on the basis of the "competitive necessity" test⁶ and, if so, whether SWBT has satisfied the test's requirements. As explained below, the Commission should find against SWBT with respect to each of these issues.

The clear intent of SWBT's proposal is to circumvent well-established and explicit Commission rules and policies designed to ensure that dominant LECs do not use their immense market power to stifle competition in the provision of access services. Those policies have by no means hampered SWBT's ability to compete successfully, including in responding to RFPs, and indeed SWBT continues to dominate the access service market. However, not content with its commanding position, SWBT is attempting to reverse the limited foothold achieved by competitors in the market through the contrivance of its RFP tariff. If the Commission sustains SWBT's proposal, SWBT and other dominant LECs can be expected to convert their special access tariffs into a plethora of discriminatory and cross-subsidized customer-specific offerings designed to suppress competition and to undercut all of the Commission's pro-competition policies. As shown below, the Commission must declare SWBT's RFP tariff unlawful.

6. See, e.g., Private Line Rate Structure and Volume Discount Practices Guidelines, 97 FCC 2d 923, 948 (1984).

II. ARGUMENT

A. ISSUE 1: SWBT's RFP Tariff Violates the Commission's Policy Prohibiting Dominant LECs from Offering Contract Tariffs

As the Commission explained in its Designation Order, Section 61.3(m) of its Rules permits only an interexchange carrier or a non-dominant carrier to offer service under a contract tariff,⁷ and therefore "by definition, a dominant LEC may not offer a contract tariff."⁸ The Commission soundly reasoned that "[a] competitive response or RFP tariff is a contract tariff that a LEC initiates when it responds to a competitor's offer to an end user, or in response to request for proposal. An RFP tariff is therefore a type of contract tariff." Thus, the Commission properly concluded that SWBT's "Transmittal No. 2633, as a tariff initiated by a LEC to respond to a competitor's offer to an end user, would appear to meet the Commission's definition of an RFP tariff that is prohibited under the Commission's current policy."⁹

SWBT seeks to avoid the thrust of the Commission's obviously correct reading of the literal terms of Section 61.3(m) by denying that Transmittal No.

7. Section 61.3(m) defines a "Contract-based tariff" as "A tariff based on a service contract entered into between an interexchange carrier subject to §61.42 (a) through (c) or a nondominant carrier and a customer." 47 C.F.R. § 61.3(m).

8. Designation Order at ¶ 17.

9. Id. at ¶ 18. In its Access Reform NPRM, the Commission is considering creating an exception to its policy of precluding dominant LECs from offering RFP tariffs provided they can demonstrate that a certain degree of competition exists in the marketplace, but it has not yet adopted any such proposal. Access Reform NPRM, 11 FCC Rcd at 21438-40.

2633 is a contract tariff, asserting that the Commission's current policies do not prohibit dominant LECs from providing service under RFP tariffs, and contending that the competitive necessity defense applies to RFP tariffs.¹⁰ These arguments are without merit. Section 61 of the Commission's Rules specifies the form and type of tariffs that dominant LECs may file pursuant to Section 203 of the Act. As the Commission noted in its Designation Order, Section 61.3(m) of its Rules allows only interexchange carriers and non-dominant carriers -- but not dominant LECs such as SWBT -- to file contract tariffs. Moreover, as the Commission correctly found, SWBT's RFP tariff is a form of contract tariff because it is "based on a service contract" with AT&T and Coastal that responds to their unique needs.

SWBT's failure to formally structure its RFP tariff as a contract tariff pursuant to the Commission's rules is irrelevant. What matters is the nature of the relationship between SWBT and AT&T and Coastal; that relationship is based on a service contract, rather than a standard general tariff offering, as SWBT concedes. Thus, in practical terms, SWBT is proposing to provide service to AT&T and Coastal on the basis of a prohibited "contract tariff," as that term is defined by Section 61.3(m) of the Commission's Rules.

10. SWBT Direct Case at 2-3.

B. ISSUE 2: SWBT's RFP Tariff Violates the DS-3 ICB Order's Restrictions on Dominant LECs Providing Generally Available Services Under Individual Case Basis Rates

SWBT's RFP tariff also violates the Commission's explicit policies restricting dominant LECs from offering standard services under ICB rates. There can be no dispute that SWBT's tariff amounts to ICB pricing, for it reflects the "practice of providing a particular service in response to a specific request from a customer under individualized rates, terms, and conditions."¹¹ Dominant LECs are permitted to offer service on an ICB basis only if they satisfy certain limited, stringent conditions, which SWBT has not even attempted to meet.¹² Moreover, the Commission has denied SWBT a general waiver of its Rules and policies for the purpose of implementing its RFP tariff, including those regarding the use of ICB pricing in this case.¹³ In this light, SWBT now denies that its RFP tariff is an ICB offering.¹⁴

11. Designation Order at ¶ 20 citing Price Cap Performance Review for Local Exchange Carriers, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858, 888 (1995) ("Price Cap Performance Review").

12. Id. at ¶ 20. Before providing service on an ICB basis, a carrier must demonstrate that (1) the service at issue is one with which the carrier is not experienced and is not "like" any of its other services; (2) the ICB rate is merely a transitional rate; (3) it will be developing average rates for the service within a reasonable period of time which it will make generally available; and (4) the rate is cost justified pursuant to Section 61.38 of the Commission's Rules. Id. citing Bell Atlantic Telephone Companies, 3 FCC Rcd 1621, 1622-23 (Com. Car. Bur. 1988).

13. Designation Order at ¶¶ 13-14.

14. SWBT Direct Case at 3-4.

In fact, SWBT's tariff is a classic example of an ICB offering since it is "an exception to the standard carrier practice of making a service generally available to prospective customers under uniform rates, terms, and conditions stated in the applicable tariff."¹⁵ By SWBT's own admission, its RFP tariff is designed as an exception to its standard tariff offerings.¹⁶ Given the lengths to which SWBT has gone in tailoring the quantities, types, and locations of facilities, and rates in response to the AT&T and Coastal RFPs, the Commission was clearly correct, and indeed understated, in finding it "unlikely" that subsequent customers would need a "network configuration that is identical" to SWBT's RFP response.¹⁷ The uniqueness of the AT&T and Coastal service arrangements makes it a certainty that no other customers will be purchasing SWBT's instant services. Thus, the Commission must conclude that SWBT's RFP tariff is nothing more than an ICB offering, which SWBT has totally failed to justify.

C. Issue 3: SWBT's RFP Tariff Violates Section 69.3(e)(7) of the Commission's Rules that Requires Dominant LECs to Offer Averaged Rates Throughout Their Study Areas

Section 69.3(e)(7) of the Commission's Rules requires SWBT to provide service under averaged rates, although it may use density zone pricing provided it charges averaged rates within each density zone, pursuant to Section 69.123(c) of

15. Designation Order at ¶ 20.

16. SWBT Direct Case at 14-15.

17. Designation Order at ¶ 33 & n.107.

the Rules.¹⁸ Thus, on its face, SWBT's RFP tariff violates Section 69.3(e)(7) of the Rules. SWBT nonetheless argues that the Commission decided in its earlier RFP Investigation Order that the competitive necessity defense provides for an exception to the requirements of Section 69.3(e)(7).¹⁹ SWBT misreads the Commission's Order. In fact, the Commission said it "has never addressed the issue of a competitive necessity justification with respect to access services of dominant LECs," and "express[ed] no view as to whether a LEC could depart from our requirement of averaged rates upon a showing of competitive necessity under these circumstances."²⁰ Accordingly, SWBT's RFP tariff rates constitute a clear-cut violation of the Commission's Rules.

D. Issue 4: SWBT's RFP Tariff Cannot be Justified On the Basis of the Competitive Necessity Test

There is no dispute that the DS-3 and multiplexer services SWBT proposes to provide AT&T and Coastal under its RFP tariff are "like" its conventional interstate DS-3 special access offerings. In order to justify this rate discrimination under Section 202(a) of the Act, SWBT attempts to invoke the competitive necessity test. This test has three elements: (1) the customers of the discounted offering have a competitive alternative; (2) the discounted offering responds to competition without undue discrimination; and (3) the discount contributes to

18. 47 C.F.R. §§ 69.3(e)(7) & 69.123(c).

19. SWBT Direct Case at 4 citing Southwestern Bell Telephone Company, Order Terminating Investigation, 11 FCC Rcd 1215 (1995) ("RFP Investigation Order").

20. RFP Investigation Order, 11 FCC Rcd at 1220.

reasonable rates and efficient services for all users.²¹ As explained below, there is no public interest basis for allowing SWBT to assert the competitive necessity defense, and in any event SWBT has not satisfied the constituent requirements of that defense.

1. Competitive Necessity Cannot Justify SWBT's Violation of the Commission's Rules and Policies

In its Designation Order, the Commission directed SWBT to "explain why competitive necessity should be available as a defense to discrimination allegations against dominant LECs," and "note[d] that the competitive necessity defense was developed to permit AT&T to respond to competition in the interexchange market." SWBT must therefore "explain how the interstate access market conditions are similar to the market conditions that existed in the interexchange market when competitive necessity was available to AT&T as a dominant carrier."²² SWBT claims that the competitive necessity defense is available to dominant LECs, and it invokes that defense in this case.²³

The Commission designed the competitive necessity test to provide dominant interexchange carriers flexibility in developing rates and services responsive to competition. By the time the Commission formally articulated and applied the competitive necessity test in 1984 to AT&T's services, competition in

21. See Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923, 948 (1984) ("Private Line Rate Structure Guidelines").

22. Designation Order at ¶ 24.

23. SWBT Direct Case at 4-8.

the private line market had been in existence for nearly fifteen years and was beginning to flourish. The Commission therefore had developed considerable experience and information concerning the extent, magnitude, and effectiveness of competition. By contrast, access service competition in general and in the SWBT markets in particular is not nearly as mature, robust, and established as it was when the Commission endorsed AT&T's use, in principle, of the competitive necessity test.

Competitors have been in operation in SWBT's markets in Houston and Dallas for only a limited period of time and have relatively small networks. In its Direct Case, SWBT provides only fragmentary and unsupported information about the extent of the competition it faces, and no persuasive substantiation for its claim that this competition is at least as substantial as the competition confronting AT&T in 1984. The reality is that SWBT faces minimal competition, and is perfectly capable of responding successfully to it under standard tariffs, which provide for density zone pricing flexibility. In these circumstances, there is no public interest reason for the Commission to afford SWBT still more pricing flexibility by allowing it employ the competitive necessity test in this case.

SWBT is wrong in arguing that the competitive necessity test justifies its RFP rates, notwithstanding the clear violation of Section 69.3(e)(7) of the Rules. The test has a very narrow and limited purpose. The Commission uses the test exclusively to determine whether a carrier's "like" service's rate or practice is unreasonably discriminatory under Section 202(a) of the Act. The test has no

other purpose, and cannot be used to demonstrate SWBT's compliance with any other statutory provision or with any other Commission rule or policy, including the requirement that it must charge averaged rates. The Commission reached precisely the same conclusion in rejecting a New York Telephone Co. claim that competitive necessity justified the de-averaging of its access service rates.²⁴

The Commission therefore has no choice: it must enforce Section 69.3(e)(7) of its Rules. Even if SWBT satisfied the competitive necessity test -- and it does not -- and demonstrated that its RFP tariff is not unreasonably discriminatory, that cannot excuse its violation of the separate and independent Commission's rule requiring it to charge averaged rates. For the same reason, the competitive necessity test cannot be invoked to permit SWBT to offer an otherwise impermissible contract tariff. Nor can the test be used to excuse SWBT's violation of the Commission's policies regarding the use of ICB pricing. In sum, the competitive necessity test can only be used as a defense to a discrimination claim under Section 202(a) of the Act; it cannot be invoked by SWBT to justify its violation of other Commission rules or policies.

2. SWBT Has Not Satisfied the Competitive Necessity Test

SWBT has also failed to satisfy the competitive necessity test even on its own limited terms. In order to satisfy the first prong of the competitive necessity test -- the existence of equally or lower priced competitive alternatives -- the Commission directed SWBT to submit with its Direct Case specific tariff pages of

24. New York Telephone Co., 5 FCC Rcd 6745 (Com. Car. Bur. 1990).

competitors' offerings or other evidence demonstrating the existence of services "comparable"²⁵ to the ones SWBT proposed to AT&T and Coastal. The Commission required SWBT to "compute the total price for comparable CAP services, and then fully explain and document the methodology, assumptions, and data it uses to make its calculations."²⁶ SWBT has failed to make the required evidentiary showings.

SWBT attaches to its Direct Case tariff pages of MFS and Time Warner for services it claims "are probably comparable to a DS3 service," such as SWBT proposed in response to the RFPs.²⁷ However, it is by no means clear that SWBT's assumption is well-founded. It is not evident, and SWBT does not demonstrate, that those competitor services have the same term, the same capacities and use the same technologies as SWBT proposed in its RFP tariff. In particular, SWBT has not shown that competitors had adequate physical collocation facilities and operational fiber to link the various AT&T locations and SWBT end offices to even compete in response to the RFP, much less offer equal or lower priced competitive alternatives. The scope of the massive network

25. The Commission explained that "comparable mean[s] CAP services that have the same term, the same capacities, and that employ the same technologies in the same geographic areas." Designation Order at n.96.

26. Id. at ¶¶ 29-30. The Commission warned SWBT that "[f]ailure to substantiate its claims, of course, could result in a failure to satisfy the first prong of the existing competitive necessity test." Id. at ¶ 29.

27. SWBT Direct Case at 10.

requirements reflected in AT&T's RFP²⁸ undoubtedly exceed by a vast margin the scope of any other service currently provided by a competitor to any other customer, as reflected in its tariff. Thus, those tariff pages alone do not establish that functional competitive alternatives to SWBT's services even existed.

Moreover, in its Direct Case, SWBT did not present any calculation showing the estimated total price of its competitors' services, or document the assumptions, methodologies or data it used in calculating its so-called competitors' rates. Again, SWBT merely attaches certain competitors' tariff pages and claims this is sufficient. SWBT then seeks to illustrate its argument by pointing to a single Time Warner rate of \$677 per DS3/month, and an MFS rate of \$1800 per DS3/month, which it compares to the \$700 and \$772 rates it offered AT&T and Coastal.²⁹ However, SWBT does not identify the tariff pages on which those rates appear, explain how it derived and calculated those rates, or describe whether they are even currently available. In any case, it is clear that MFS' \$1800 rate -- 250% higher than the rate SWBT offered AT&T -- cannot be considered a realistic competitive alternative.

In the Designation Order, the Commission indicated that it was "unable to validate SWBT's estimate of the prices other carriers currently offer for the service AT&T requested in its RFP, and SWBT has made no attempt to estimate the rates

28. See Designation Order at n.107.

29. SWBT Direct Case at 10-11.

that are available to Coastal."³⁰ SWBT has not submitted any new information in its Direct Case, and the brief tariff examples it culls from its Description & Justification, as described above, obviously do not sustain its argument.

For all the reasons discussed above, it is clear that SWBT has utterly failed to establish that realistic equal or lower priced alternatives existed such as to warrant the departure from its standard rates. The Commission must therefore conclude that SWBT has failed to carry its burden of proof with regard to the first prong of the competitive necessity test.

SWBT also fails to satisfy the second prong of the competitive necessity test -- i.e., demonstrate that its RFP tariff rates respond to competition without undue discrimination against SWBT's other customers. In its Designation Order, the Commission tentatively concluded that Transmittal No. 2633 was unduly discriminatory because the tariff "appears to require subsequent customers to have a network configuration that is identical to that of AT&T or Coastal, a circumstance we believe would be unlikely."³¹ SWBT makes no effort to dispute that conclusion beyond the weak and unpersuasive claim "that the probability of

30. Designation Order at ¶ 31.

31. Id. at ¶ 33. As the Commission noted, in order to obtain the same rate SWBT offered to Coastal, a subsequent carrier would need to order the exact same service quantities Coastal ordered: 25 digital transmission links and 2 multiplexers with four nodes consisting of one customer premises at the same three SWBT central offices. To obtain the same rate offered to AT&T, a subsequent carrier would need to obtain 164 DS-3 circuits and 142 multiplexers at same 25 locations as AT&T requested. Id. at n.107.

this situation repeating itself may be somewhat limited."³² In fact, of course, there is absolutely no possibility that any other carrier would order precisely the same service as AT&T or Coastal.

SWBT has not made even the slightest effort to avoid any undue discrimination against its other customers. SWBT instead essentially argues that broadening the scope of its offering to appeal to at least some other customers to minimize such discrimination would have required it to engage in rate averaging, which would "contradict the entire philosophy behind competing for a particular service in specific geographic location."³³ SWBT's argument essentially reads the second prong of the competitive necessity test out of existence. It amounts to saying that SWBT's interest in capturing the RFP business is all that matters and that the interests of its other customers in not being discriminated against matter not at all.³⁴

SWBT misunderstands the second prong of the competitive necessity test. Its purpose is to ensure that, in responding to competition, a carrier address the discrimination concerns of its existing customers. It is no answer to say, as SWBT does, that subsequent customers can always issue another RFP to which SWBT or another carrier might respond, and thus they will not be harmed. There might be no response to that RFP or the response might not satisfy the customer. The filing

32. SWBT Direct Case at 14.

33. Id. at 14.

34. Id. at 14-15.

carrier rather has an affirmative obligation to show that it has taken steps to ensure that its new rate or service has been designed in such a way as to minimize any discrimination against existing customers. In this case, however, SWBT has crafted its RFP tariff in such a way as to maximize the discrimination against its other customers because it is a certainty that no other customers will be able to subscribe to the services offered to AT&T and Coastal. In this light, the Commission must conclude that SWBT has failed to satisfy the second prong of the competitive necessity test.³⁵

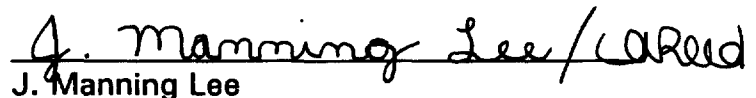
35. TCG expresses no views on the Commission's tentative conclusion that SWBT has satisfied the third prong of the competitive necessity test by demonstrating that its proposal contributes to reasonable rates for all users. Designation Order at ¶ 34.

III. CONCLUSION

For the reasons stated above, the Commission should declare SWBT's Transmittal No. 2633 unlawful.

Respectfully submitted,

TELEPORT COMMUNICATIONS GROUP INC.

Handwritten signature of J. Manning Lee in cursive script.

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CERTIFICATE OF SERVICE

I, Charlene A. Reed, do hereby certify that on this 28th day of August, 1997, I have caused a copy of the foregoing COMMENTS OF TELEPORT COMMUNICATIONS GROUP INC. to be served via hand-delivery upon the persons listed below:

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A handwritten signature in black ink, appearing to read 'Charlene A. Reed', written over a horizontal line.

Charlene A. Reed